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Supreme Court of the United States

OCTOBER TERM, 1944

No. 946

LOUIS KAUFMAN,

Petitioner,

against

THE UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF APPLICATION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now LOUIS KAUFMAN and respectfully petitions this honorable Court for a reconsideration of his petition for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit affirming petitioner's conviction in the United States District Court for the Southern District of New York.

The petition for a writ of certiorari, bearing No. 946 of the October Term, 1944, was denied on April 2, 1945.

Counsel are not unmindful of the fact that this Court is understandably reluctant to burden itself with this extensive record in a case where the crime charged is abhorrent in kind and no sympathy is attached to the petitioners. But counsel persist in an effort to obtain a review and fair consideration for this petitioner whose guilt of the crime was never shown by any evidence, competent or not, and whose conviction can be explained only by recognition

that he was tried in an atmosphere grossly prejudicial to any dispassionate appraisal of the proof.

This prejudice was two-fold: (1) In the proof offered against co-defendants, not even claimed to touch petitioner, but in the atmosphere of which evidence altogether remote from the crime charged was introduced against him, for what the Court below said was the "highly laudable purpose" of prejudicing petitioner, whether or not the evidence was true. (2) In the prosecutor's appeal to the jury to convict petitioner so that petitioner might thereby be constrained to become a witness for the Government against another person, pictured as an associate of the other defendants.

Counsel cannot believe that this Court would refuse review to this petitioner and idly allow him to suffer seven years of imprisonment if not for the fact that counsel's presentation must have been inadequate to demonstrate the injustice here perpetrated by the departures from accepted rules of law and procedure. Therefore this petition that the matter be reconsidered.

I

Although the summary of the evidence against petitioner, set forth in the opinion below is demonstrably wrong in a number of respects—that is to say, the Circuit Court of Appeals changed and added to the evidence in asserting what was thought to have been proven against petitioner, even taking that summary at face value, it is clear that the opinion below, on its face, is in direct conflict with the rulings of other Circuit Courts of Appeals, and directly contrary to applicable decisions of this Court.

Thus, in the face of the recital in the opinion below that the payment was made *after* the negotiations had culminated in an agreement, and that Warner Bros. had been assured that Kaufman would not cause a strike, the Court below said " * * * there was every probability that it [the

money] had been paid to avoid a breakdown in the negotiations, and a consequent strike. If in addition to this, Kaufman told the truth when he said he had paid the whole amount to Bioff, no other conclusion was possible than that he was a party to the general conspiracy."

On the very face of the opinion of the Court below it appears that the only competent evidence held to connect this petitioner with the vast conspiracy charged and claimed to have been proven, was that he had said he had, as a messenger, delivered to Bioff $15,000 which Warner Bros. had given petitioner in 1936. The Court below from this bare circumstance drew the inference that petitioner "could not have been unaware that Bioff was not acting for himself" and concluded that "Not only was Kaufman therefore acquainted with the conspiracy, but he wished his hearers to understand that he was engaged in it."

The explicit text of the opinion below shows a direct refusal to follow the ruling of this Court in *Direct Sales Co.* v. *U. S.*, 319 U. S. 703, in that it sanctions an inference of knowledge and permits a presumption of participation to be predicated upon the inferred knowledge.

On no more than that it was testified that petitioner had sometime said that he had taken the money to Bioff, the Court below has held there was sufficient proof of connection with the conspiracy.

Lest it be thought that this is over-simplification on petitioner's part, reference is made to the exact language of the opinion below, "The jury was free * * * to convict Kaufman on his own declaration." And to show that the Court below recognized that it was inference only upon which connection with the conspiracy was predicated, see the language of the opinion that petitioner "could not have been unaware that Bioff was not acting for himself" and that these other persons "were his accomplices as he had implied".[1]

[1] The Trial Court, too, stated explicitly that the assumption of knowledge on petitioner's part rested wholly upon inference (R. 2602-2603). And see the prosecutor's argument, R. 2600.

Petitioner was a mere business agent of one of the nearly 800 local unions making up the International Association of Theatrical Stage Employees, etc., and so at the lowest level of importance. Bioff was the personal representative of the International President of this great Union, at the topmost level of importance. The inference is therefore at least as admissible that when petitioner said that he as a messenger had taken the Warner Bros. money to Bioff, he was carrying out orders from the chief of his Union, and not acting as a knowing participant in this vast conspiracy with which he was not otherwise in the least shown to have any connection. In this respect the opinion below is in direct and inescapable conflict with decisions in other Circuit Courts of Appeals, *e.g.*: Third Circuit: *Graceffo* v. *U. S.*, 46 F. (2d) 852, 853; Fifth Circuit: *Kassin* v. *U. S.*, 87 F. (2d) 183; Sixth Circuit: *Tucker* v. *U. S.*, 224 Fed. 833; Eighth Circuit: *Dahly* v. *U. S.*, 50 F. (2d) 37; Ninth Circuit: *Terry* v. *U. S.*, 7 F. (2d) 28.[2]

These other Circuit Courts of Appeals have refused to allow a verdict of guilt to stand if founded on circumstances susceptible of an inference of innocence. The Second Circuit has rejected this view and has held that after verdict the same proof that would sustain a verdict in a civil case is sufficient in a criminal case.

What the Second Circuit rule comes down to is, that the verdict of a jury is final and conclusive if an inference of guilt may possibly be drawn from circumstances, regardless that contrary inferences are equally or more logically deducible. Thereby in the Second Circuit the presumption of innocence and the requirement of proof beyond a reasonable doubt have become empty shibboleths, unheeded by the Appellate Court any more than by a Trial Judge if

[2] In *U. S.* v. *Valenti*, 134 F. (2d) 362, 364, the Court below explicitly rejected the doctrine of these cases and numberless others, saying that it confused the function of judge and jury, as well as the nature of the proof required in criminal cases. *U. S.* v. *Mule*, 141 F. (2d) 487, 488, reiterated this position. In slightly different form it was restated in *U. S.* v. *Feinberg*, 140 F. (2d) 592, at p. 594, and in *U. S.* v. *Cohen*, 145 F. (2d) 82, at p. 86, where the Court again recognized the conflict between its views and those of other courts. The two lines of development meet in the petitioner's case.

ignored by a jury swayed by prejudice or some motive other than the proof. Unless this Court is in accord with this concept, and has completely discarded the rule of *Coffin* v. *U. S.*, 156 U. S. 432, then this case merits review. In any event, the conflict among the Circuit Courts of Appeals ought to be resolved.

The Trial Court had said on a number of occasions during the trial, after all of the testimony concerning the delivery of this money to Kaufman, and his alleged declarations that he had taken the money to Bioff, that the prosecution had not connected Kaufman with the conspiracy. It was thus obvious to the Trial Court that inferences other than those leading to guilt could be drawn from all of this testimony.

The prosecution certainly realized that it had failed to connect Kaufman to the conspiracy by all of the testimony that the Court below now says pointed to guilt.

The prosecution therefore offered the testimony of the perjurer, Roach, in an attempt to bridge the essential gap in its proof.

That Roach's testimony was completely perjurious was not demonstrated until well into the defendants' case. The fact that the perjury was not until then demonstrated was the only explanation for the failure of the Trial Court to dismiss the indictment against petitioner at the close of the Government's case. Indeed, it was not until all of the summations of defense counsel had been completed and only during the summation of the prosecutor, that the Trial Court announced its determination to direct the jury to disregard the testimony of the perjurer, Roach.

So, the inferences are now sought to be drawn to replace the perjured testimony. But the inferences are just as dubious.

II

Directly contrary to the decision of this Court in *Glasser* v. *U. S.*, 315 U. S. 60, the Court below has explicitly held "The only other testimony connecting Kaufman is that in the spring of 1934 when several of the group were discussing how to elect Browne as president of the Union, one, Buchalter, had said that he would see to it that a person named Zwillman 'delivers Kaufman' ". The Court below said that when it appeared "that Kaufman later became connected with the conspiracy, all evidence became competent against him, of whatever had been theretofore done in its execution". This holding is in direct and unmistakable conflict with the ruling of the Circuit Court of Appeals for the Sixth Circuit in *Nibbelink* v. *U. S.*, 66 F. (2d) 178, and likewise in direct and irreconcilable conflict with the ruling of the Circuit Court of Appeals for the Tenth Circuit in *Minner* v. *U. S.*, 57 F. (2d) 506. The cited decisions hold squarely that testimony of declarations of alleged co-conspirators can be admitted only upon independent proof that the person against whom such testimony is to be used was a member of the conspiracy *at the time* the declarations were made.

From the very nature of the testimony, as shown in the opinion below, it is abundantly clear that petitioner could not possibly have been a member of the conspiracy at the time of the alleged discussion; the very discussion obviously did not even look forward to participation in the conspiracy by petitioner; and most important of all, the crime itself was legally uncommittable at the time of the alleged declaration because the discussion was had long prior to the time when the statute denouncing the crime was enacted into law.

Yet the Court below has approved the use of that testimony and has allowed it to color its judgment that petitioner was connected with the conspiracy;[3] having done

[3] The Circuit Court of Appeals said this was "other testimony connecting Kaufman".

that, it of course ignored the fact that the Trial Court allowed the jury to consider the testimony to determine if petitioner was connected.

III

By denying certiorari, this Court has failed to correct:

(1) The clear discrepancy between the Second Circuit and other circuits in respect of allowing an inference of guilt to be drawn from circumstances susceptible of an inference of innocence;

(2) The use of perjured testimony;

(3) The use of evidence of alleged spoliation without regard for either the truth or connection with the case on trial;

(4) The use of hearsay for the purpose of connecting a defendant, the more abhorrent legally because the hearsay related to a time prior to any possible participation of the defendant and even before the statute denouncing the crime was enacted.

IV

Counsel for other defendants in this case who have petitioned for rehearing can demonstrate that their petition is not for delay, because such other petitioners have long since been serving the sentences imposed. This petitioner cannot make a like demonstration because he alone was allowed to remain on bail pending the appeal, and the Court below stayed its mandate pending the petition for a writ of certiorari. Nevertheless, the foregoing recital is respectfully submitted as a demonstration of the fact that this petitioner, whose position in this case is unique, can point to direct conflicts between the opinion below and the rulings in other circuits concerning the admissibility of

evidence and the sufficiency of proof, which must have been overlooked by this Court else the petition could not have been denied.

Wherefore, your petitioner, by counsel whose signatures are subscribed, prays that his petition for a writ of certiorari may be reconsidered.

Counsel certify that this petition for a rehearing is submitted in good faith and the sincere belief that it has merit, and not for the purpose of delay.

Respectfully submitted,

LOUIS KAUFMAN,
Petitioner,

by J. BERTRAM WEGMAN and
HAROLD SIMANDL,
Counsel for Petitioner.